QUESTION PRESENTED

Whether Article I, § 2, cl. 2 and Article I, § 3, cl. 3 of the Constitution, which set forth minimum age, citizenship, and residency qualifications for members of the U.S. House of Representatives and U.S. Senate, respectively, bar the people of the several States from limiting the number of terms which their representatives in Congress can serve?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 93-1456 and 93-1828

U.S. TERM LIMITS, INC., *et al.*, *Petitioners,*

v.

RAY THORNTON, *et al.*, *Respondents.*

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas, *Petitioner,*

v.

BOBBIE E. HILL, *et al.*, *Respondents.*

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR RESPONDENTS REPUBLICAN PARTY OF ARKANSAS AND W. ASA HUTCHINSON SUPPORTING PETITIONERS

Pursuant to Rules 12.4 and 24.2 of the Rule of this Court, respondents Republican Party of Arkansas and W. Asa Hutchinson, Chairman of the Republican Party of Arkansas

and member of the Arkansas State Board of Election Commissioners, respectfully submit this brief in support of petitioners. Respondents adopt by reference the portions of the brief of the State Petitioner in No. 93-1828 containing the matters required by this Court's Rule 24.1(b), (d), (e), and (g).

CONSTITUTIONAL PROVISIONS

Respondents adopt by reference the portions of the brief of the State Petitioner in No. 93-1828 containing the matters required by this Court's Rule 24.1(f), with the addition of the following provisions:

Article IV, § 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY OF ARGUMENT

The implausible reading of the Constitution's Article I § 2, cl. 2 and § 3, cl. 3 adopted below is indefensible. It conflicts with the Constitution's text, structure, and history. It ignores the theoretical foundations of the American government. And if such a strained interpretation was ever necessary to protect the Republic against possible anti-republican assault, as some have claimed, that day is now long past. The decision below must be overturned.

ARGUMENT

I. THE CONSTITUTION'S TEXT, STRUCTURE, AND HISTORY DEMONSTRATE THAT STATES MAY ADD QUALIFICATIONS TO THOSE SPECIFIED IN ARTICLE I.

The Arkansas court appeared to believe that it is an open question whether Article I forbids states from adding qualifications for its elected representatives to Congress. In fact, the evidence, fairly considered, proves the opposite. Consider the following.

First, the criteria in Article I, § 2, cl. 2 and § 3, cl. 3 are not "Qualification Clauses"; rather, they are *Dis*qualification Clauses. Each provision, phrased in the negative ("no Person shall be a Representative [or Senator] who shall not have attained" minimum age, citizenship, and inhabitancy requirements), stands in marked contrast to the affirmatively phrased Voter Qualifications Clause, which immediately precedes the Disqualification Clause of Article I, § 2.

The significance of this important language difference was recognized by the founding generation. In 1807, for example, Representative John Randolph of Virginia stated during a House debate over the contested election case of *Barney v. McCreery*:

> Mark the distinctions between the first and second paragraphs [of Art. I, § 2]. The first is affirmative and positive. "They shall have the qualifications necessary to the electors of the most numerous branch of the State Legislature." The second merely negative. "No person shall be a Representative who shall not have attained the age of twenty-five years," &c. No man could be a member without these requisites; but it did not follow that he who had them was entitled to set at naught such other requisites as the several States might think proper to demand. If the constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally ran thus: "*Every person* who has attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives."

M. Clarke and D. Hall, *Cases of Contested Elections in the House of Representatives*, 178-79 (1834) ("*Contested Elections*"); *see also id.* at 185 (Rep. Bibb) ("The language [of Art. I, § 2, cl. 2] was not such, according to legal construction, as to induce the House to say that the State authorities might not require other qualifications.").

Second, the founders—specifically, the Constitutional Convention's Committee on Style—deliberately adopted negative phrasing in the Disqualification Clauses to make those provisions work in parallel with other constitutional provisions. The Committee on Style's charter was to "revise the stile of and arrange the articles which had been agreed to by the House." 2 Max Farrand, *The Records of the Federal Convention of 1787*, 553 (Yale 1937) ("*Farrand*"). As a result, the negative phrasing of the Disqualification Clauses—"no Person shall be a Representative [or Senator]"—echoes similar negative phrasing in another Article I disqualification provision, the Incompatibility Clause. *See* U.S. Const. Art I, § 6, cl. 2 ("*no Person* holding any Office under the United States, *shall be a Member of either House* during his Continuance in Office") (emphasis added); *Cf.* U.S. Const. amend. XIV, § 3 ("*No person shall be a Senator or Representative in Congress* . . . who, having previously taken an oath . . . to support the Constitution of the United States

shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof") (emphasis added).

By settling on uniform, negative phrasing for the Article I, § 2, § 3, and § 6 clauses, the Convention, under the direction of the Committee on Style, plainly intended to contrast these provisions with the affirmative prerequisites for admission to Congress set forth elsewhere in the Constitution. *See, e.g*, Article I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States); Article VI, cl. 3 (The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution"). As a textual matter, therefore, the suggestion that Article I, §§ 2 and 3 set *exclusive* qualifications is no more compelling than an argument that the Incompatibility Clause or section 3 of the Fourteenth Amendment set exclusive qualifications. The fact that these multiple provisions are phrased in parallel terms refutes the claim that the disqualifications appearing in any one were intended to be "exclusive."

Third, the original version of the Disqualification Clauses, as set forth at the Convention in the Virginia Plan, included express language making the affirmative qualifications specified in that draft of the clause exclusive. *See* 2 *Farrand* at 139 ("delegates shall be the age of twenty five years at least, and citizenship: (*and any person possessing these qualifications may be elected except*)") (emphasis added). Therefore, the Convention's substitution of the open-ended, negative phrasing in Article I, § 2, cl. 2 and § 3, cl. 3 can only be read as rejecting exclusive qualifications.

Fourth, the Disqualification Clauses' interpretation in the immediate post-ratification period confirms that they were understood to specify minimum, not exclusive, disqualifications. Significantly, many States adopted additional qualifications immediately after the ratification of the

Constitution. *See, e.g.*, Va. Act of Nov. 20, 1788, ch. 2, § 1 (property and district residency requirements); Ga. Act of Jan. 23, 1789 at 247 (district residency); N.C. Act of Dec. 16, 1789, ch. 1, § I (district residency). Moreover, the so-called "*McCreery*" case, the historical episode cited most often in defense of the exclusivity of the Disqualification Clauses, actually demonstrates the opposite. In this regard, both this Court and the court below have confused the meaning of *McCreery* by citing as authoritative a committee report *rejected* by the House of Representatives as a whole. *See Powell v. McCormick*, 395 U.S., 486, 542-43 (1969); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (1994) (plurality opinion).

McCreery occasioned the first comprehensive congressional debate over the meaning of the Article I Disqualification Clauses. It occurred in 1807, when the House considered a contested election between Joshua Barney and William McCreery, in which Mr. Barney disputed whether Mr. McCreery, the apparent victor, resided in the City of Baltimore, as he was required to do by a Maryland law setting district residency as a prerequisite for service in Congress. In an initial report, the House Committee of Elections recommended that McCreery be seated on grounds that "the qualifications of members are . . . determined [in the Constitution], without reserving any authority to State Legislatures to change, add to, or diminish those qualifications." *Contested Elections* at 168. But "[o]n the consideration of this report in a Committee of the Whole House, a debate arose, and was continued several days, and terminated at length by the recommitment of the report to the Committee of Elections." *Id.* at 169. The report was then revised so as to delete all reference to constitutional issues and focus instead on the issue of where Mr. McCreery in fact resided. *Id.* at 169-71.

After the submission of the new report, the House seated Mr. McCreery by a resolution stating only, "*Resolved*,

That William McCreery is entitled to his seat in this House." *Id.* at 171. Of those who voted to seat McCreery, some clearly believed that he was a resident of Baltimore and therefore qualified under Maryland law. *See, e.g., id.* at 185, 200 (Rep. Bibb); *id.* at 186 (Rep. Montgomery). Others thought that the Maryland law was unconstitutional. *See, e.g., id.* at 187 (Rep. Alston). Still others suggested that perhaps a State *legislature* could not impose additional qualifications, but that the people themselves could impose additional qualifications as the people of Arkansas did in this case. *See, e.g., id.* at 193 (Rep. Johnson) ("Would any power less than a convention of the State of Maryland assume the right of adding a disqualification?"). In sum, the only certainty emerging from the *McCreery* debate is that a House majority was unwilling to embrace the proposition that States lack power to add disqualifications to those appearing in Article I.

Fifth, the Constitution's Article VI, cl. 3 also demonstrates that the Disqualification Clauses are not exclusive. That clause provides:

> The *Senators and Representatives* before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States.

U.S. Const art. VI, cl. 3 (emphasis added).

When this provision was first introduced, it required only that members of Congress and other state and federal officers take an oath to support the Constitution. Two weeks after Congress adopted the final wording of the Article I, § 2 Disqualification Clause, however, the Convention amended this

Article VI clause, adding the phrase, "But no religious test shall ever be required as a qualification to any office of public trust under the United States." 2 *Farrand* at 461.

The formulation, "any Office of public Trust under the United States," naturally encompasses the federal legislative, executive, and judicial officers mentioned in the first half of the clause, while omitting state officers, and thus leaving open the possibility of religious establishments in the States. *Cf.* Mass. Const. Pt. 1, Art. III (1780); *Barnes v. First Parish*, 6 Mass. 334, 338 (1810) (recognizing that the Massachusetts Constitution established the Congregational Church). But this express prohibition of religious tests for, *inter alia*, "Senators and Representatives," would have been unnecessary had the Article I disqualifications been considered exclusive. The Convention's decision explicitly to forbid this one type of additional qualification is therefore compelling evidence that other additional qualifications were envisioned and not foreclosed by Article I.

Finally, the Tenth Amendment specifies the rule of construction for constitutional prohibitions on State power. It provides: "The powers not . . . prohibited by [the Constitution] to the States, are reserved to the States respectively, or to the people." Under this rule, prohibitions on State power must be limited to their terms. By reserving to the States all powers not prohibited them by the Constitution itself, the rule forbids courts from construing the Constitution so as to prevent States from adopting limitations going beyond those expressed in the document. Were the rule otherwise, then the lengthy list of prohibitions relating to States' enforcement of the criminal law—*see, e.g.*, U.S. Const. art I., § 10, cl. 1 (prohibiting states from "pass[ing] any Bill of Attainder"); *id.* (prohibiting states from "pass[ing] any . . . ex post facto law); *id.* Amend. V (Double Jeopardy Clause); *id.* (prohibition on self-incrimination); *id.* (Due Process Clause); *id.* Amend. VI (trial by jury); *id.* (Confrontation Clause)—could be construed as

exhaustive, with the States in danger of being prohibited from providing additional rights to criminal defendants in their constitutions. As a textual matter, the argument that the constitutional disqualification provisions are exhaustive is no more compelling than this unpersuasive argument that States are barred from providing additional rights to criminal defendants.

II. THE PARADE OF HORRIBLES TRADITIONALLY RELIED ON BY ADVOCATES OF THE POSITION EMBRACED BY THE ARKANSAS COURT ARE READILY ADDRESSED UNDER THE COURT'S RECENT DECISIONS.

As demonstrated above, any textual, structural, or historical argument for the exclusivity of the Article I Disqualification Clauses is weak. A more superficially persuasive argument is the parade of horribles that is often predicted if the clauses are given their natural (and intended) reading. As one participant in the *McCreery* debate argued:

> If [the Maryland Legislature] had the power of restricting the choice of Representatives as to place, why not as to other qualifications? They might say that no man was qualified to serve as a Representative . . . who was not a farmer, a mechanic, or of any other profession. . . . The State Legislature might enact that no person should be a Representative who was not a federalist . . . . If the Legislature determined that members from the State of Maryland should possess a certain [large] property . . . would it not be verging toward aristocracy? If they were to say that all members of the State should be chosen from the town of Baltimore would it not appear absurd? And yet they had as much right to do this as to say that each

> member should be a resident of a particular district.

Contested Elections at 188-89 (Rep. Rowan).

The prospect of such horribles perhaps explains the willingness of eminent, bygone jurists to distort the Disqualification Clauses in order to limit States' power to set qualifications for election to Congress. *See, e.g.*, 2 Joseph Story, *Commentaries on the Constitution of the United States* § 624 (1833), *reprinted in* 5 *The Founders' Constitution* 843 (1987) (qualifications specified in Article I are exclusive); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 257 (1880) (same); Charles Warren, *The Making of the Constitution* 420-22 & n.1 (1937) (same). In their own day, such jurists viewed a constitutional landscape on which these Clauses, twisted to serve the purpose, stood as lonely bulwarks against a possible anti-republican assault on Congress through the specification of restrictive electoral qualifications. To be sure, Rep. Rowan's *McCreery* speech noted the possibility that the Guaranty Clause, U.S. Const. art. IV, § 4, might be used to repel such assaults. *See Contested Elections* at 188 (Rep. Rowan). By mid-nineteenth century, however, this prospect, always conjectural, had been foreclosed. *See Luther v. Borden*, 48 U.S. 1, 42-43 (1849) (holding that issues arising under the Guaranty Clause are political questions not resolvable by the courts). From that time until more than a century later, constitutional law had no ready answer for Representative Rowan's fears.

As this Court's interpretation of the Fourteenth and First Amendments has evolved, however, Rowan's horribles no longer apply. Each monster in his parade is now well-confined by settled doctrine, quite apart from the Disqualification Clauses. Beginning after *Baker v. Carr*, this Court has subjected laws affecting the conduct of elections to demanding constitutional scrutiny under Article I, § 2, cl. 1 and the First

and Fourteenth Amendments. *See Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that constitutional challenges to malapportioned legislatures do not present nonjusticiable "political questions"); *see also, e.g., Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional districting scheme invalidated on constitutional grounds); *Williams v. Rhodes*, 393 U.S. 23 (1968) (ballot access scheme for presidential election invalidated on constitutional grounds); *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992) ("[T]he rigorousness of our inquiry into the propriety of a state election law depends on the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.). Through these doctrines, the Court has reduced Rowan's horribles to spectres—and answered the hoary argument that once might have favored an unnatural reading of the Disqualification Clauses. Today, it is unpersuasive to claim that the Court must twist these Clauses to protect the Republic.

III. THE THEORY OF THE CONSTITUTION REQUIRES THAT AMBIGUITY BE RESOLVED IN FAVOR OF ARKANSANS' ABILITY TO ALTER THE SYSTEM BY WHICH THEY CHOOSE THEIR REPRESENTATIVES IN CONGRESS.

The issue before this Court is not whether the national Constitution delegates to States or their people a power to add to the list of electoral qualifications for Congress. It is whether the people of Arkansas, in concert with the people of the rest of the nation, have delegated away that power in enacting the federal Constitution. The plurality below believed that the question of "whether the states are foreclosed from adding a restriction to candidacy in the form of service limitations is not specifically addressed" by the Constitution. 872 S.W.2d at 356. But if that is so, then the plurality's conclusion—that the authority to limit terms "is not [one] left to the states under the Tenth Amendment," *id.* at 357—must be false. Under the

structure of our government, as under the Tenth Amendment, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see also New York v. United States*, 112 S.Ct. 2408, 2418 (1993) (same).

The Declaration of Independence articulated the principle that just governments are instituted through the consent of the governed to protect inalienable rights with which human beings are endowed. Dec. of Ind. para. 2. The Declaration also stated a necessary corollary to that principle: "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." *Id.*

The Constitution rests firmly on these fundamental principles of popular sovereignty. As this Court has recognized, the Constitution "is but the body and the letter of which the [Declaration] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). Thus, in 1787, the people of the United States exercised their sovereign right to alter their former government, which at the time consisted of a delegation of power to thirteen states that had in turn formed a national confederation. *See* Articles of Confederation, 1 Stat 4 (1777). The 1787 convention was called under the authority of that confederation, but once convened, derived its authority directly from the people. Thus, the new constitution was legitimated not by the amendment provisions of the Articles of Confederation—which it in fact violated—but by the authority

of the people, as is confirmed by the first words of the Constitution's Preamble: "We the People." [1]

Yet the new government did not simply replace the old one. Rather, a new mechanism in the science of politics was deployed, through which the People, as ultimate sovereign, divided governmental authority, delegating some to the new national government, while continuing to delegate other authority to the existing States. *See, e.g*, James Wilson, speech in Pennsylvania Ratifying Convention, 4 Dec. 1787, *reprinted in* 1 *The Founders' Constitution* at 62 ("[The people] can delegate [such power] in such proportions, to such bodies, on such terms, and under such limitations, as they think proper."); *see also Barney v. McCreery*, *reprinted in Contested Elections* at 202 (Rep. Quincy) (Congress and the States both derive their authority from the people). Of course, this idea of divided, delegated authority required a recognition that the people themselves can operate in different capacities at the same time. As James Wilson described the process to the Pennsylvania Ratifying Convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according

[1] *Cf.* Articles of Confederation Art. 13, in 1 Stat. at 8 ("[T]he articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and shall afterwards be confirmed *by the Legislatures of every State*.") (emphasis added).

> to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed.

James Wilson, Speech in Pennsylvania Ratifying Convention, 4 Dec. 1787, *reprinted in* 1 *The Founders' Constitution* at 62 citing Declaration of Independence para. 2.

Under this regime, the sovereign people act simultaneously as a national community and through separate state communities. In this manner, the people must, when expressing their sovereign will at the state level, be entitled to regulate the mechanisms through which they choose their national representatives, subject only to the express constraints that they to have imposed on themselves through the national community. *See, e.g, In re Duncan*, 139 U.S. 449, 461 (1891) ("the distinguishing feature 'of a republican form of government' is the right of the people to choose their own officers for governmental administration, and pass their own laws."); *Gregory v. Ashcraft*, 501 U.S. 452, 463 (1991) quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (The authority of the people of the States to determine the qualifications of their most important government officials "go[es] to the heart of representative government. . . . It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'").

Consequently, the admission below that the Constitution does not specifically forbid the imposition of additional qualifications should have been dispositive. The structure of our government, like the Tenth Amendment's canon of construction, requires that the people in their state communities be permitted to exercise all power not expressly

withdrawn through the national Constitution. *See, e.g, Collector v. Day*, 78 U.S. 113, 124 (1870), *overruled on other grounds by Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) ("It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."). Because it ignored this simple, fundamental rule, the court below concluded erroneously that Arkansans were powerless in the face of the erosion of their republican institutions.

CONCLUSION

The Arkansas Supreme Court's ruling that Amendment 73 to the Arkansas Constitution is invalid under Article I of the Constitution should be reversed, and the case should be remanded for consideration of respondents' challenges to Amendment 73 under the First and Fourteenth Amendments.

Respectfully submitted,

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